

Review report under the
Government Information (Public Access) Act 2009

Applicant: Big Rob
Agency: Lismore City Council
Report date: 27 July 2020
IPC reference: IPC20/R000289
Agency reference: CDR20/593 & DC CDR20/95
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Legislation cited: *Government Information (Public Access) Act 2009; Government Information (Public Access) Regulation 2018; Government Information (Public Access) Bill 2009; Local Government Act 1993*
Cases cited: *McEwan v Port Stephens Council* [2018] NSWCATAP 21; *Destination NSW v Taylor* [2019] NSWCATAP 123; *Smith v Commissioner of Police (NSW)* [2012] NSWADT 85; *Turner v Corrective Services* [2013] NSWADT 39; *National Tertiary Education Union v Southern Cross University* [2015] NSWCATAD 151; *Miskelly v Transport for NSW* [2017] NSWCATAD 207; *McKinnon v Blacktown City Council* [2012] NSWADT 44

This review has been conducted under delegation by the Information Commissioner pursuant to section 13 of the *Government Information (Information Commissioner) Act 2009*.

Summary

Mr Big Rob (the Applicant) applied for information from Lismore City Council (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act). The information sought by the Applicant related to the returns of pecuniary interests of council staff.

The Agency decided to refuse to provide access to some of the information requested.

The Applicant applied for external review on 24 April 2020. The reviewer obtained information from the Agency including the notice of decision and the Agency's GIPA file.

The review of the Agency's information and decision concluded that its decision is not justified.

Under section 93 of the GIPA Act, the reviewer recommends that the Agency make a new decision by way of internal review.

The reviewer makes four additional recommendations to the Agency in accordance with section 92 and section 95 of the GIPA Act which involve the provision and publication of open access information.

Background

1. On 15 January 2020, the Applicant applied under the GIPA Act to the Agency for access to the following four items of information:
 1. *A list of designated persons at Lismore City Council;*
 2. *disclosures by Councillors and Designated Persons dating back to the 2008-2009 financial year;*
 3. *copies of all written requests from all Councillors and Designated Persons in the form prescribed by the Local Government (General) Regulations 2005 (“the Regulations”), containing particulars of the relevant risk claimed, as required pursuant to section 739(4) of the Local Government Act 1993 (“Local Government Act”); and*
 4. *copies of all verifying statutory declarations attached to each relevant written request from all Councillors and Designated Persons as also required pursuant to section 739(4) of the Local Government Act.*
2. On 30 January 2020, the Agency advised the Applicant that it required payment of an advance deposit for the processing of items 3 and 4.
3. On 27 February 2020, the Applicant sought an internal review of the Agency’s decision to impose an advance deposit for the processing of items 3 and 4.
4. On 27 February 2020, the Agency made a decision for items 1 and 2, deciding:
 - information responsive to item 1 was not held
 - to provide access to some of the information responsive to item 2
 - to refuse to provide access to other information responsive to item 2 making redactions on public interest grounds
 - that no information responsive to item 2 was held with relation to financial years 2008-2013.
5. The Agency’s notice of 27 February 2020 made no decision on items 3 and 4 as the advance deposit was still outstanding.
6. While not necessarily at issue in this matter, the Agency’s approach of severing the application while the timeframe for decision was paused (per section 68(2) of the GIPA Act) appears inconsistent with the processes set out in the GIPA Act. There are potential consequences to an applicant’s review rights in adopting such an approach, for example an applicant might be forced to pay a \$40 internal review application fee twice. Further, I note for the Agency’s interest the decision of the Appeal Panel in *Department of Communities and Justice v Zonneville* [2020] NSWCATAP 126 where the Appeal Panel adopted an uncomplicated reading of the procedures within the GIPA Act relating to the handling of applications and found that severability was not possible in deciding validity.
7. On 2 March 2020, the Agency wrote to the Applicant acknowledging their request for internal review and sought clarification of the following:

In order for us to process your internal review could you please urgently clarify that you are seeking a review on the processing costs.

The Applicant responded with the following:

I seek review of processing costs, application cost, any redaction of current pecuniary interest disclosures which were not already in place prior to my request unless

supported lawfully with the correct form and statutory declaration before the request was made and any changes to historical pecuniary interest disclosures made after my request was made. My GIPA application relates to open access material that should be readily available or available upon request without cost.

8. On 5 March 2020, the Agency advised the Applicant of the following:

In response to your email below of 2 March 2020, Council understands that you are seeking an internal review of the processing fee for items 3 and 4 of the GIPA Request as outlined in Council's letter dated 30 January 2020. In accordance with the provisions of s.85(1) of the GIPA Act, you will be required to pay the application fee of \$40.00 to progress consideration of that internal review.

In addition, and given the content of your emails below, can you please clarify the following matters to ensure that Council is able to properly respond to your internal review request:

- 1. Are you now also seeking an internal review of the imposition of the \$30 GIPA application fee (which was paid by you on 15 January)?*
- 2. Are you seeking an internal review of Council's decision concerning Items 1 and 2 of the GIPA Request as set out in Council's notice of decision dated 27 February 2020?*

If you are unable to clarify your position on the matters above and the payment of the fee by close of business on 6 March 2020, Council will have no option than to deal with your application on the basis that you are only seeking an internal review of the processing fee for items 3 and 4 of the GIPA Request as outlined in Council's letter dated 30 January 2020, and deal with your request on that basis. If you require any clarification, please do not hesitate to contact Christine Cotterill, but the details of any review application will need to be clearly set out and articulated in writing in order for Council to properly respond

9. The Applicant responded on the same date with the following:

Why does Council have such a problem understanding simple requests?

No further clarification was received from the Applicant nor was payment of the \$40 internal review fee paid to the Agency.

10. On 27 March 2020, the Agency advised the Applicant:

I refer to the email trail below.

In relation to items 3 & 4 of the Government Information (Public Access) Act 2009 (GIPA) request as notified by Council's letter dated 30 January 2020 and advise that Council has not received any payment as requested in the email of 5 March 2020 below. Council is not willing to extend the period for payment any further, and as a result of non-payment of the fee, your request for internal review is now considered to have not been properly made and is now outside of time, pursuant to s.83(1) of the GIPA Act.

In relation to items 1 & 2 in Council's email below dated 5 March 2020, it is now deemed there is no internal review request on these matters, and these matters are also outside of time for any further review.

As a consequence of the above, the current notices of decisions in effect on your GIPA access applications remain in place

11. On 14 April 2020, the Agency advised:

In circumstances where:

- 1. Council had advised you that payment of the advance deposit was due on 26 March 2020,*

2. You received notice from Council about that the Second Review had not been validly made on the following day, that is on 27 March 2020, and

3. Your subsequent email to Council of 27 March 2020 suggests that you may not understand the alternative methods for payment of the advance deposit which are available to you,

I have decided under section 68(4) of the GIPA Act to grant you a further 7 days from the date of this letter to make payment of the advance deposit. In the event that payment of the advance deposit is not made by 21 April 2020 I will proceed to make a final determination under the GIPA Act with respect to Items 3 and 4 of your request...

12. On 22 April 2020, the Agency provided the Applicant with a notice of decision relating to items 3 and 4 outlining that it had decided to refuse to deal with that part of the application due to a failure to pay the advance deposit.
13. On 23 April 2020, the Applicant sought external review of the decisions relating to items 1 and 2 together with the decisions regarding items 3 and 4.
14. As more than one reviewable decision was made in relation to the items in the access application, I consider section 81 of the GIPA Act to be of relevance where:

Extended review period where more than one decision made

When more than one reviewable decision is made in respect of a particular access application and those decisions are made at different times, the period (the review period) within which a person may apply for a review under this Part of any of those decisions is extended to the end of the review period for the last of those decisions.

Therefore, the review period commenced on 23 April 2020 and the application for external review was received in time.

Decisions under review

15. The Information Commissioner has jurisdiction to review the decision made by the Agency pursuant to section 89 of the GIPA Act.
16. The decisions under review are the Agency's decision:
 - a. to refuse to provide access to some of the information within item 2
 - b. refuse to deal further with an access application due to non-payment of an advance deposit within the time required for payment.
 - c. that information is not held with regards to item 1 and some of the information within item 2
17. These are reviewable decisions under section 80(d) and 80(l), 80(e) respectively.
18. Further, section 70(3) of the GIPA Act requires that the review of the decision to refuse to deal with an access application due to non-payment include an additional review of the decision to require an advance deposit in accord with section 80(j)

The public interest test

19. The Applicant has a legally enforceable right to access the information requested, unless there is an overriding public interest against disclosing the information (section 9(1) of the GIPA Act). The public interest balancing test for determining whether there is an overriding public interest against disclosure is set out in section 13 of the GIPA Act. For further information on the public interest test, see the resource sheet at the end of this report.

Public interest considerations in favour of disclosure

20. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:
- a. *The returns which are subject to item 2 of the GIPA Request comprise “open access information”*
 - b. *The purpose of these pecuniary returns is a transparency measure for Local Government that key decision makers in Councils appropriately disclose and manage pecuniary interest they may have in matters they are dealing with. This requirement is explicitly stated in Council’s adopted Code of Conduct (2019).*
21. These public interest considerations in favour of disclosure are considered below. The Agency is reminded that it is not limited in the public interest considerations in favour of disclosure that it may consider in deciding an access application. In any reconsideration of its decision, the Agency may also wish to consider that section 12(1) of the GIPA Act provides that there is a general presumption in favour of the disclosure of government information and disclosure could reasonably expect to promote open discussion and enhance the accountability or contribute to positive and informed debate or that disclosure could ensure effective oversight of the decision making processes by Council on matters affecting the public.

Public interest considerations against disclosure

22. In its notice of decision, the Agency raised the following public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
- a. reveal an individual’s personal information (clause 3(a) of the table to section 14 of the GIPA Act)
 - b. expose a person to a risk of harm or of serious harassment or serious intimidation (clause 3(f) of the table to section 14 of the GIPA Act)
23. These public interest considerations against disclosure are considered together below.

Public interest considerations against disclosure

Item 2

24. In its decision the Agency states:
- In response to Item 2 of the access application, a search was undertaken of Council records impacted by this request. It was determined that the request captures 512 records pertaining to 140 individuals. These records relate to returns lodged by designated persons in the 2013- 2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018 and 2018-2019 financial years.*
- ...
- Under s58(1)(b) of the GIPA Act, I have determined that the requested information relating to the 2008-2009, 2009-2010, 2011-2012 and 2012-2013 will not be provided as these records are not held by Council.*
25. It is noted that at review, the Agency’s schedule of documents identifies additional considerations not mentioned in the notice of decision (clauses 2(b), 2(d), 3(c), 3(e), 3(g) and 4(d)). However, other than particularising the considerations to the records within the schedule and providing the information at issue, the Agency has not

advanced material to support a claim that these considerations are well founded. In view of these facts and noting the onus of the Agency in section 97(2) of the GIPA Act as well as the requirements in section 61 of the GIPA Act to provide reasons and findings at the moment of decision, I make no further findings on these additional considerations.

26. Having regard to the individual rights considerations (clauses 3(a) and 3(f)), in its notice of decision the Agency has merely claimed that the considerations apply absent any findings to support this claim.
27. Under section 61(a) of the GIPA Act, an agency must provide reasons for its decision when refusing access to information because there is an overriding public interest against disclosure. In meeting this requirement, the Agency is encouraged to have regard to the decision of *Miskelly v Transport for NSW* [2017] NSWCATAD 207 when relying on public interest considerations against disclosure. In that decision, the Tribunal stated at [31]:
In order for the considerations against disclosure set out in the table to section 14 of the GIPA Act to be raised as relevant, the agency must establish that the disclosure of the information could reasonably be expected to have the effect outlined in the table.
28. In justifying its reliance on the public interest considerations against disclosure, the Agency must give reasons, including findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based. This includes establishing *all* the elements of the consideration including identifying the anticipated prejudicial effect and explaining *how* disclosure of the information at issue could result in the prejudice identified.
29. In *McKinnon v Blacktown City Council* [2012] NSWADT 44 at [44], the Tribunal stated:
In my view the weight of authority establishes that it is necessary for the Agency to demonstrate, with respect to each public interest consideration against disclosure upon which it relies, that disclosure could reasonably be expected to have the nominated effect as explained in Cockroft and elucidated in McKinnon v Secretary, Department of Treasury.
30. For the above reasons, I cannot be satisfied that the Agency's reliance on the factors it has identified against disclosure of Item 2 are justified.

Open access information

31. The *GIPA Regulation 2018* (GIPA Regulation) identifies pecuniary interests to be open access information. Schedule 1, clause 2 of the GIPA Regulation states:
(2) Information contained in the following records (whenever created) is prescribed as open access information:
returns of the interests of councillors, designated persons and delegates,
32. Part 2 of Schedule 1 of the Model Code sets out the matters that must be disclosed in the returns of interest in the following categories:
 - interests in real property: clauses 5 – 8
 - gifts: clauses 9-11
 - contributions to travel: clauses 12-14
 - interests and positions in corporations: clauses 15-18
 - interests as a property developer or a close associate of a property developer: clauses 19-20
 - positions in trade union and professional or business associations: clauses 21-22

- dispositions of real property: clauses 23-25
 - sources of income: clauses 26-30
 - debts: clauses 31 – 33
 - discretionary disclosures: clause 34 (A person may voluntarily disclose in a return any interest, benefit, advantage or liability, whether pecuniary or not, that is not required to be disclosed under another provision of the Schedule).
33. In its decision, the Agency has acknowledged that information in the Agency's returns constitutes Council's returns of interest and is deemed open access information under the GIPA Regulation. However, the Agency has redacted information relying on clause 3(a) and clause 3(f) to do so.
34. The Agency states:
- The information that will be redacted includes personal information, including addresses and signatures contained in the returns of all staff members and former staff members, and the redaction of information from Councillors and former Councillors where they have provided an objection to the release of this information. Where a Councillor or former Councillor has not provided an objection or provided consent around the release of the information, the record will be provided in full.*
35. Having regard to the intentions of Parliament with regards to open access information, Parliament's second reading of the GIPA Bill 2009 states the following:
- The new legislation shifts the focus toward proactive disclosure. The legislation requires that certain "open access information" must be published. This includes details of an agency's structure and functions, its policy documents, and its register of significant private sector contracts. In addition, agencies are authorised to release other information unless it is sensitive personal information or there is some other overriding public interest reason why it cannot be disclosed. There is a significant amount of information that can and should be released without the need for a formal application*
36. As pecuniary interest returns are prescribed as open access under the GIPA Regulation, it is apparent that the intention of Parliament is that this information be released so as to inform the public of important issues and to allow for confidence in the dealings of public sector officials.
37. Local Government plays a vital role in our democratic system of government. Councillors and senior officials have powers that impact the daily lives of the citizens they represent through decisions such as development applications. Under the GIPA Act, there are legislated requirements to ensure that these powers are transparently exercised and that decision makers are accountable. Information such as financial interests and interest in real property are the types of information that are mandated for disclosure under the GIPA Act to prevent the harm of corruption. These are all factors in favour of disclosure that serve to assure citizens that the principles of a fair and effective democratic system of government is preserved particularly by those who are elected or appointed to administer that system.
38. The Information Commissioners Guideline 1 - For Local Councils on the disclosure of information (returns disclosing the interest of councillors and designated persons) (Guideline 1) provides:
- Disclosure of information contained in the returns of the interests of councillors and designated persons is an important public accountability measure. Open access information should be treated as a special class of information when determining information access. Accordingly, the threshold to displace Parliament's intent that it is open access is set at a high level*

39. Proactive release of information advances the objects of the GIPA Act to *maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective...*
- (a) authorising and encouraging the proactive public release of government information by agencies, and*
- (b) giving members of the public an enforceable right to access government information, and*
- (c) providing that access to government information is restricted only when there is an overriding public interest against disclosure.*
40. Further, as provided for in Guideline 1, *'disclosing the information in the returns furthers openness, transparency and accountability in local government. It also facilitates the identification and management of potential conflicts of interest that might arise where councillors and other staff participate in decisions from which they may derive, or be perceived to derive, personal or financial benefit.'*
41. The Agency does not indicate whether it considered Guideline 1 when making its decision. In accordance with section 15(b) of the GIPA Act, agencies must have regard to any relevant guidelines issued by the Information Commissioner when determining whether there is an overriding public interest against disclosure of government information. The Agency should consider Guideline 1 in any reconsideration of its decision.
42. As discussed above, the Agency does not provide reasons which set out its application of the public interest test so as to explain why it considered that there is an overriding public interest against disclosure of the information on the basis of the clauses claimed. Therefore, it is my view that the Agency has not justified its decision that there is an overriding public interest against disclosure of the information.
43. I refer the Agency to the decision of *McEwan v Port Stephens Council* [2018] NSWCATAP 211 (cited in *McEwan v Port Stephens Council (no 3)* [2018] NSWCATAP 286 at [70] where the Appeal Panel found at [42]:
- ... we think that because the information in issue was open access information the Tribunal needed to start with the position that this was an important factor in favour of disclosure which was additional to other relevant factors in favour of disclosure, including the general public interest in favour of disclosure provided for in s 12(1) of the GIPA Act. In our view such an approach is necessary in order to give meaningful effect to the mandatory release requirement expressed in s 6*
44. In this instance, the Agency has taken an indiscriminate approach to redaction not only relying on considerations against disclosure not identified or acknowledged within the notice of decision but also treating the personal information of public officials as though it were subject to an exemption absent any material indicative of individualised sensitivity or the adequate demonstration of how the public interest weighs against release.
45. As relevantly discussed by the Appeal Panel in *Destination NSW v Taylor* [2019] NSWCATAP 123 the public interest test will apply in different ways to different information. This is true even if sets of information are of the same essential kind and subject to the same considerations. The Tribunal explained:
- ...the weight to be attributed to each public interest consideration depends on the effect of disclosing each particular piece of information.*
46. Additionally, the GIPA Act specifically defines personal information as it relates to the holders of public office in schedule 4, clause 4(3)(b) of the Act. In the absence of a demonstrated application of the meaning of personal information as defined in the

GIPA Act (sch 4, cl 4(3)(b)) together with any relevant findings to satisfy section 61(a), I cannot be satisfied that the decision is justified.

47. Given the nature of pecuniary interests – being open access information and considering Parliament’s intentions regarding pecuniary interests – I cannot be satisfied that the Agency has justified its decision. To justify its decision of an overriding public interest against disclosure the Agency necessarily needs to apply the public interest test to each and every different return at issue including reasonable explanation and analysis to justify its decision making.

Third party consultation

48. The Agency states that it conducted third party consultation and considered objections raised by the third parties to assist with the identification of the public interest considerations against disclosure.

49. In its decision, the Agency states:

A large number of individuals consulted with during the third-party consultation process cited a concern that the release of their personal information may expose them to risk of harm or of serious harassment or serious intimidation.

The objections do not mean that I cannot release the information. However, I must take them into account when making my decision. I have therefore considered them when applying and balancing the public interest test.

I have decided to give the objections significant weight in applying the public interest test given:

(a) the personal factors of the application outlined in section 4.2 above,

*(b) the **Council’s duty of care under work health and safety legislation** owed to all staff. [emphasis added]*

50. Section 14(2) of the GIPA Act is relevant in this instance. The subsection provides:

The public interest considerations listed in the Table to this section are the only other considerations that may be taken into account under this Act as public interest considerations against disclosure for the purpose of determining whether there is an overriding public interest against disclosure of government information.

51. The Agency has taken into account its obligations with relation to Workplace Health and Safety (WHS) as a public interest consideration against disclosure. However, an agency’s duty under WHS legislation is not a public interest consideration against disclosure listed in section 14 of the GIPA Act and therefore cannot be considered when conducting the public interest test and therefore while it may be a genuine concern raised in the course of the third party consultation it is not a public interest consideration against disclosure that can be relied upon for the purposes of section 14(2) of the GIPA Act.

52. In the same vein, it appears that the Agency has misapplied the provisions of third-party consultation as outlined in section 54 of the GIPA Act. Any anticipated prejudice taken into account must be supported by a consideration in section 14 of the GIPA Act and a complete demonstration of the elements of each consideration is required.

53. I acknowledge that in its decision the Agency has identified consideration 3(f) to be relevant due to the objections. In assessing the Agency’s application of 3(f), I considered the Agency’s reasoning with regards to third party objections as reliant upon clause 3(f). However, even in this context, the notice of decision fails to address the requirements of this provision (please see PIC resource sheet attached).

54. Further, it appears that the Agency has applied weight and conducted the public interest test on the objections themselves. The fact that a third party is concerned or has objected to proposed disclosure is not a consideration against disclosure.
55. The Information Commissioner's *Guideline 5: Consultation on public interest considerations under section 54 of the GIPA Act* provides that the views of third parties are matters an agency needs to consider in determining if any public interest considerations against disclosure apply and if so, how much weight is to be given to those considerations.
56. Therefore, where an agency has received an objection from a third party it does not, in and of itself, amount to a determinative finding of an overriding public interest against disclosure. The interests of a third-party objector or even multiple third-party objectors do not displace the right of access to government information and the associated presumption in favour of disclosure.
57. In any reconsideration of its decision, it is recommended that the Agency give due consideration to Guideline 5.

Form of access

58. In its decision, the Agency states:

Council has historically provided access to these returns by appointment, as view only records, in accordance with section 72(1)(a) of the GIPA Act. I have decided that access to the documents will be provided in this same way
59. The Agency does not fully explain this decision and has not provided further information to justify the application of this provision in the course of the external review. I note that section 72 of the GIPA Act requires that access be provided in the way requested and mandates that this requirement can only be diverged from in the circumstances prescribed in subsection 2 which does not include consideration of 'historical practice'.
60. Noting that the Agency were intending to provide view access to the information with "personal information" already redacted there does not appear to be any reasonable justification for the Agency's application of section 72 of the GIPA Act.
61. Additionally, I would point out that Section 6(2) of the GIPA Act states:

*(2) Open access information is to be made publicly available free of charge **on a website** maintained by the agency (unless to do so would impose unreasonable additional costs on the agency) and can be made publicly available in any other way that the agency considers appropriate. [emphasis added]*
62. Further, Guideline 1 states:

The returns should be made publicly available on the council's website free of charge unless there is an overriding public interest against disclosure or to do so would impose unreasonable additional costs on the council
63. Section 95 of the GIPA Act empowers the Information Commissioner to make a recommendation *that any general procedure of an agency in relation to dealing with access applications be changed to conform to the requirements of this Act or to further the object of this Act.*
64. The Agency's decision does not provide justification for its refusal to provide open access information as mandated under section 6(2) of the GIPA Act. The Agency's reasons for decision contain the assertion that it is common practice to provide the returns in a way not consistent with section 6(2) of the GIPA Act. The Agency's decision is in effect confirmation of its noncompliance with the requirements of the GIPA Act.

65. In accordance with section 95, I recommend that:
- the Agency conform with the requirements of section 6(2) of the GIPA Act, and;
 - the Agency provide advice to the Information Commissioner regarding its procedures to achieve compliance with s6(2) of the GIPA Act **by 1 November 2020**.
66. In making this recommendation I also provide advice to assist the Agency. Section 6(2) enables the Agency to make open access information available by another means in addition to website publication by firstly mandating website publication and secondly providing agencies with discretion to make open access available by another means.

Sufficiency of searches

67. Under section 53 of the GIPA Act, an agency must undertake reasonable searches for information to find information within the scope of a request.
68. With regard to item 1, in its decision, the Agency states the following:
- For Item 1 of the GIPA Request, I have determined in accordance with section 58(1)(b) of the GIPA Act that the Council does not hold a “List of Designated Persons at Lismore City Council”.*
- The General Manager is however required by section 440AAB of the Local Government Act 1993 to keep a register of returns disclosing interests under the code of conduct. If Council’s current register of returns was intended to be the subject matter of Item 1, it is open to you to make a further request for access to this register under the GIPA Act.*
- ...
- In response to Item 1 of the access application, a search was conducted which confirmed that Council does not keep a “list of designated persons”.*
69. In assessing the Agency’s searches, I have had regard to the Tribunal decision in the matter of *Smith v Commissioner of Police (NSW)* [2012] NSWADT 85 (*Smith*) where the Tribunal states at [27]:
- In making a decision as to the sufficiency of an agency’s search for documents which an applicant claims to exist, there are two questions:*
- a. Are there reasonable grounds to believe that the requested documents exist and are documents of the agency; and if so*
 - b. Have the search efforts made by the agency to locate such documents been reasonable in all the circumstances of a particular case*
70. In the Applicant’s external review application, the Applicant states:
- Council provided me with a non-current list of ‘designated persons’ in response to item 1 of my request. They also stated they do not hold such a list to avoid providing me current information. They are currently running a process through council’s secretive Audit, Risk and Improvement Committee to reduce the number of ‘designated persons’ by about 70 persons even though their current pecuniary interest register was reduced months ago. Details are not accessible to the public. They have since suggested I apply again for the same information under a different name even though the information I seek is very clear.*
71. Part 4 of the Model Code defines a ‘designated person’ to include the following:
- a) the general manager*

b) other senior staff of the council for the purposes of section 332 of the LGA

c) a person (other than a member of the senior staff of the council) who is a member of staff of the council or a delegate of the council and who holds a position **identified by the council** as the position of a designated person because it involves the exercise of functions (such as regulatory functions or contractual functions) that, in their exercise, could give rise to a conflict between the person's duty as a member of staff or delegate and the person's private interest

d) a person (other than a member of the senior staff of the council) who is a member of a committee of the council **identified by the council** as a committee whose members are designated persons because the functions of the committee involve the exercise of the council's functions (such as regulatory functions or contractual functions) that, in their exercise, could give rise to a conflict between the member's duty as a member of the committee and the member's private interest. (emphasis added)

72. Therefore, it is reasonable to expect that an agency will need to have conducted an assessment to identify designated persons from whom they will require a return to be lodged annually. As a matter of good practice, the agency will need to have some means by which to verify that all persons required to have lodged a return for the period have done so. Those procedures will enable the agency to meet its obligations to manage and monitor the conduct of councillors and staff in the context of pecuniary interests under the agency's code of conduct,
73. On this basis, I am satisfied that the Applicant has shown that belief that a list of designated persons exists and is held by the Agency is based on reasonable grounds.
74. As to the second limb in *Smith*, I have reviewed the Agency's search information with regard to item 1. In the course of the review, the Agency advised the IPC that it had conducted an electronic search of the TRIM database and advised the following:
- In relation to item 1 I have attached a copy of the document search record conducted. The electronic search was undertaken on the basis of the understanding that there is no statutory requirement for Council to maintain a "list of designated persons".*
75. It does not appear that a thorough search for the 'list of designated persons' was undertaken. The fact that it is not a statutory requirement for the Agency to maintain a list of designated persons does not eliminate the prospect of its existence. As searches did not extend beyond an electronic search using the terms 'list of designated persons' and it does not appear that further enquiries were made with the General Manager or other members of staff, I cannot be satisfied that the Agency has discharged its onus under section 53 of the GIPA Act in locating a record responsive to item 1.
76. With regard to item 2, in its decision, the Agency states:
- In response to Item 2 of the access application, a search was undertaken of Council records impacted by this request. It was determined that the request captures 512 records pertaining to 140 individuals. These records relate to returns lodged by designated persons in the 2013- 2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018 and 2018-2019 financial years.*
- ...
- Under s58(1)(b) of the GIPA Act, I have determined that the requested information relating to the 2008-2009, 2009-2010, 2011-2012 and 2012-2013 will not be provided as these records are not held by Council.*
77. The Applicant submits:
- Regarding item 2, only the most recent disclosures have been provided after I requested the information, at which point I was unlawfully refused access, but not*

before publishing the disclosures online days later albeit heavily redacted. The previous years, as requested, have not been provided.

78. When seeking further information relating to the Agency's searches, the Agency advised:

In relation to requested information relating to the years 2008-2009, 2009-2010, 2011-2012 and 2012-2013, those documents were known to not be held as electronic records by Council, and no electronic searches were undertaken on the basis of that knowledge held by numerous staff within council. Further enquiries need to be made...

79. The Agency further advised:

I refer to your request below and advise that I have been unable to locate any records regarding searches undertaken in relation to the requested information relating to the years 2008-2009, 2009-2010, 2011-2012 and 2012-2013.

80. Guideline 1 states:

Part 4 of the Model Code establishes the requirements for the disclosure of pecuniary interests by councillors and designated persons. This includes disclosures of interests in written returns (returns of interests) and disclosures of pecuniary interests at meetings...

The Model Code is made under section 440 of the Local Government Act 1993 (NSW) (LGA) and Part 8 the Local Government Regulation 2005. Part 4 of the Model Code replicates and replaces the requirements previously set out in sections 441- 449 of the LGA.

The LGA previously required that the current version of the return of interests of councillors and designated persons was to be made available for public inspection free of charge.

In 2009, the GIPA Act replaced section 12 of the LGA with the mandatory proactive release provisions in [sections 6](#) and [18](#) of the GIPA Act, and the GIPA Regulation.

81. Therefore, given the historical obligations to collect and disclose pecuniary interests in written forms, I am satisfied that there are reasonable grounds to believe that the information referred to in item 2 exists and is contained in records held by the Agency.
82. In the course of the review, the IPC sought further information about the Agency's searches for this particular information however, the Agency was unable to provide evidence of its searches. On the information available to the IPC, I am not satisfied that the Agency's search for this information was reasonable in all the circumstances. It is a statutory requirement for the Agency to keep, record and disclose pecuniary interests. In these circumstances, it would be expected that such information would be held.
83. On this basis, I am not satisfied that the Agency has discharged its onus under section 53 of the GIPA Act.

Items 3 & 4

Advance deposit

84. In the Applicant's external review application, the Applicant states:

Items 3 and 4 were not provided on the basis I refused to pay an advance deposit. The information sought relates to the written requests and statutory declarations legally required from staff relating to the redactions made on the pecuniary interest disclosures before they were made available to me. I do not believe council has these

for all redactions as is and very clearly described and required pursuant to section 739(4) of the Local Government Act 1993.

I should have been provided with access to the information I sought on the day I attended the council chambers on 4 December 2019. I believe the subsequent redactions were only done as a result of my request so items 3 and 4 directly relate to my requests under items 1 and 2.

85. This information does not constitute open access information that is to be provided free of charge under section 6 of the GIPA Act and accordingly I will consider the relevant facts against the legislation dealing with the imposition of processing charges.
86. It is noted that the Applicant's concerns regarding redactions made to the information was discussed above. Therefore, the issue to be discussed in this part of the report is the Agency's decision to refuse to deal with items 3 & 4 of the access application due to non-payment of the advance deposit. Whilst I acknowledge that there are certain provisions of the *Local Government Act 1993* the Agency is required to comply with, I note that non-compliance with this legislation is not within scope of the Information Commissioner's review jurisdiction.
87. Section 64-71 of the GIPA Act sets out the provisions regarding processing charges and advance deposits.
88. Section 64(1) of the GIPA Act provides:

An agency may impose a charge (a processing charge) for dealing with an access application at a rate of \$30 per hour for each hour of processing time for the application.
89. Section 64(3) of the GIPA Act provides:

The application fee of \$30 paid by an applicant counts as a payment towards any processing charge payable by the applicant
90. In *National Tertiary Education Union v Southern Cross University* [2015] NSWCATAD 151 ('NTEU'), the NSW Civil and Administrative Tribunal (Tribunal) held (at [30]):

Section 64 of the GIPA Act does not refer to the making of a decision concerning a processing charge. Rather, s 64(1) empowers an agency to "impose" a charge. It is doubtful that the imposition of a charge could occur until work on an application had been finished and the number of hours spent on the application was known. It is also unlikely that, until the application is determined, the agency would know the total amount of time that is necessary to be spent by any officer of the agency in dealing efficiently with the application (within s 64(2)(a)). Further, it is not until an agency has decided an access application that it can determine whether it is entitled or empowered to impose a processing charge.
91. Accordingly, an agency cannot provide the final processing charge prior to making a decision about an access application. An agency can only provide an estimate of the processing charge when an advanced deposit is requested.
92. With respect to the tasks that attract a processing charge, paragraphs 3.8 of the Information Commissioner's *Guideline 2: Discounting Charges* states:

The processing charge covers the total amount of time that it takes an agency to deal efficiently with the application and to provide a response to the application. This includes time expended to consider the application, searching for records, consulting any third parties, and making a decision.
93. It is noted that on 22 January 2020, the Agency requested an advance deposit of \$1140. This amount included the Agency's dealing with the open access information. However, on 30 January 2020, the Agency revised its advance deposit amount by

removing the time attributed to dealing with the open access information. The Agency advised:

We cannot charge for access to open access information, nor for third party consultation conducted in relation to the historical disclosures made by Councillors and Designated persons. The processing charges in relation to this part of your application have been withdrawn accordingly.

94. As a result, the Agency revised its required advance deposit to \$150 less the \$30 application fee (50% of the total amount required, being \$300). The Agency advised that this amount is based on:
- ...estimates relate to s739 returns and statutory declarations from the 2019/20 period only. This involves 34 records that require both third party consultation and consideration. It does not include any returns from years prior to 2019/20.*
95. Based upon the volume of information and relevant consultation, the advance deposit of \$120 appears to be reasonable in the circumstances. The Agency has requested 50% of the total amount and reduced the amount by \$30 for the application fee already paid. The Agency has charged for actions considered reasonable by Guideline 2 and on the face of it, I do not consider the estimated charge to be excessive.
96. Whilst I acknowledge that the Applicant's request for items 3 and 4 are associated with the redactions made to the pecuniary interest information, it is noted that the information responsive to items 3 and 4 is not open access information. Therefore, the Agency is permitted under section 64(1) to impose a processing charge and request an advance deposit for 50% of the estimated charges.
97. The Agency required payment to be made on or before 20 February 2020. On 27 February 2020, the Agency provided an update on the application and further clarified the revised advance deposit required. The Agency provided an extension of time for payment to be made and confirmed the new due date for payment was 26 March 2020. The Agency also advised that should payment not be received the Agency may refuse to deal with this part of the application. On 14 April 2020, the Agency provided a further notice to the Applicant explaining the background of its request for payment of the advance deposit and provided a further 7 days for the Applicant to make payment. As a result, the due date for payment was 21 April 2020.
98. On 22 April 2020, the Agency released its formal notice of decision advising that due to non-payment of the advance deposit, the Agency had decided to refuse to deal with that part of the application.
99. The Applicant's non-payment of the advance deposit is not in dispute.
100. Section 70 of the GIPA Act states:
- 70 Result of failing to pay advance deposit**
- (1) An agency may refuse to deal further with an access application if the applicant has failed to pay an advance deposit within the time required for payment (unless the applicant has applied for review under Part 5 of the decision to require the advance deposit within the time required for payment of the advance deposit).*
101. As discussed above, items 3 and 4 are not identified as open access information under the GIPA Regulation. As the Agency has requested payment of an advance deposit pursuant to section 64(1) of the GIPA Act providing the Applicant with opportunity to make payment with two extensions provided to the due date, I am satisfied that the Agency's decision, to refuse to deal with the part of the application relating to items 3 and 4 in accordance with section 70 of the GIPA Act, is justified.

Personal factors of the application

102. Under section 55 of the GIPA Act, the personal factors of the application may be relevant considerations against disclosure if (and only to the extent that) those factors are relevant to the agency's consideration of whether the disclosure of the information could reasonably be expected to have any of the effects referred to in clauses 2–5 (but not clauses 1, 6 or 7) of the table to section 14.
103. In its decision, the Agency states:
- I can also take into account any personal factors of your application, under section 55 of the GIPA Act. I have considered:*
- (a) That the applicant has a long history of making allegations on the public record of corruption and maladministration by various Council staff and Councillors,*
- (b) The Council has observed an escalating pattern of behaviour by the applicant in targeting staff and Councillors on social media and in the public gallery, and*
- (c) It is reasonable to conclude from information that the applicant has already placed in the public arena, that the motives for accessing the requested information may include ongoing harassment of staff and Councillors.*
104. As discussed above, the Agency does not discuss or explain how exactly it considered these factors in its application of the public interest test.
105. The Agency's discussion is communicated in authoritative terms and is evocative of factors it may seek to rely upon, but the claims made are unquantified and lack any supporting evidence to ensure compliance with section 61 of the GIPA Act.
106. Further, it appears that the Agency has considered these personal factors as factors against the disclosure in and of themselves.
107. Section 55 of the GIPA Act prescribes the consideration of personal factors with particular parameters including the following requirements:
- (2) The personal factors of the application can also be taken into account as factors in favour of providing the applicant with access to the information.*
- (3) The personal factors of the application can be taken into account as factors against providing access if (and only to the extent that) those factors are relevant to the agency's consideration of whether the disclosure of the information concerned could reasonably be expected to have any of the effects referred to in clauses 2–5 (but not clause 1, 6 or 7) of the Table to section 14.*
108. The references to personal factors in the manner set out above does not demonstrate that the Agency has adhered to the requirements of the above provisions detailed in paragraph 103 in its consideration of the personal factors.
109. Therefore, I am not satisfied that the Agency has correctly considered the personal factors in accordance with section 55 of the GIPA Act.

Conclusion

110. On the information available, I am satisfied that the Agency's decisions under review:
- a. are **not** justified with relation to the decision to refuse to provide access to information in item 2 because there is an overriding public interest against disclosure. I make this finding because the Agency has not adequately demonstrated its consideration or applied the public interest test in the way required by the GIPA Act.

- b. are justified with relation to the decision to refuse to deal with items 3 and 4 as the Applicant did not, in fact, pay the advance deposit.
- c. are **not** justified with relation to the decision that no information is held with relation to items 1 and 2 (financial years 2008-2013) as the Agency has not discharged its onus to conduct reasonable searches under section 53 of the GIPA Act
- d. are justified with relation to the decision to require an advance deposit of \$120.

Recommendations

111. Under section 93 of the GIPA Act, I recommend that the Agency make a new decision by way of internal review.
112. Under section 92 of the GIPA Act, I recommend that:
- a. that the Agency make available all information that is open access information to the Applicant.
 - b. that the Agency take into account the guidance provided in this report.
113. In accordance with section 95, I recommend that:
- a. the Agency conform with the requirements of section 6(2) of the GIPA Act.
 - b. the Agency provide advice to the Information Commissioner regarding its procedures to achieve compliance with s6(2) of the GIPA Act **by 1 November 2020**.
114. I ask that the Agency advise the Applicant and the IPC **within 10 working days** of the actions to be taken in response to our recommendations.

Applicant review rights

115. This review is not binding and is not reviewable under the GIPA Act. However, a person who is dissatisfied with a reviewable decision of an agency may apply to the NSW Civil and Administrative Tribunal (NCAT) for a review of that decision.
116. The Applicant has the right to ask the NCAT to review the Agency's decision.
117. An application for a review by the NCAT can be made up to 20 working days from the date of this report. After this date, the NCAT can only review the decision if it agrees to extend this deadline. The NCAT's contact details are:

NSW Civil and Administrative Tribunal
Administrative and Equal Opportunity Division
Level 10, John Maddison Tower
86-90 Goulburn Street,
Sydney NSW 2000
Phone: 1300 006 228
Website: www.ncat.nsw.gov.au

118. If the Agency makes a new reviewable decision as a result of our review, the Applicant will have new review rights attached to that new decision, and 40 working days from the date of the new decision to request an external review at the IPC or NCAT.

Completion of this review

119. This review is now complete.

120. If you have any questions about this report, please contact the Information and Privacy Commission on 1800 472 679.

Cassandra Vizza

Regulatory Officer